

**IN THE CIRCUIT COURT OF TENNESSEE
SIXTEENTH JUDICIAL DISTRICT AT MURFREESBORO**

GARY WAYNE BUSH,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

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NO. 68966

(POST-CONVICTION)

ORDER DENYING POST-CONVICTION RELIEF

This matter came on to be heard on January 8 and March 4, 2014, upon the Petition for Relief from Conviction or Sentence filed by GARY WAYNE BUSH on November 13, 2012, as amended on November 29, 2012 and as further amended on May 16, 2013. After examining the Petition and other records relating to Petitioner's conviction in Case No. F-61320B, and further considering the testimony of the Petitioner, trial counsel, co-defendant at trial, co-defendant's trial counsel, and arguments of counsel, the Court hereby DENIES post-conviction relief in accordance with the following findings of fact and conclusions of law:

I. LAW

The Sixth Amendment of the U.S. Constitution and Art. I, Section 9 of the Tennessee Constitution both guarantee the right to "reasonably effective" assistance of counsel, which is assistance that falls "within the range of competence demanded of attorneys in criminal cases." Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also* Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish two prongs: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. Strickland, *supra*, at 687. The petitioner's failure to

establish either prong is fatal to a claim of ineffective assistance of counsel. Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

To establish the first prong of deficient performance, the petitioner must demonstrate that the attorney's "acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006) (internal quotation marks and citation omitted). Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law. Baxter, supra, at 934-35. A reviewing court "must be highly deferential and must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (internal quotations and citation omitted). Counsel will not be deemed ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991).

To establish the second prong of prejudice, the petitioner must prove a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Vaughn, supra, at 116. A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome. Strickland, supra, at 694.

In a post-conviction relief evidentiary hearing, the petitioner has the burden of proving the allegations of fact by "clear and convincing evidence." T.C.A. § 40-30-110(f). Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Grindstaff v. State, 297 S.W.2d 208, 216 (Tenn. 2009). There is a rebuttable presumption that a ground for relief not raised before a Court of competent jurisdiction in which the ground could have been presented is waived. Id.

II. FACTS

In the case at bar, the Petitioner alleges that his trial attorneys, John G. Mitchell, Jr. (hereinafter “John Mitchell”) and John G. Mitchell, III (hereinafter “Jack Mitchell”), rendered ineffective assistance in connection with his trial by jury. The Petitioner was found guilty of first-degree murder on September 16, 2008, and was sentenced to life imprisonment. The Petitioner alleges¹ that his trial counsel: (1) failed to investigate alternate theories of defense and/or call all essential witnesses at trial; (2) failed to investigate the “drug addiction” of Kevin Patterson at the time of Mr. Patterson’s confession to the shooting at issue; (3) failed to obtain his co-defendant’s employment records; (4) failed to call the Petitioner to testify in his own defense; and (5) failed to challenge the Indictment on the grounds that it listed a *Tennessee Code Annotated* section that was not in effect at the time of the offense.

Petitioner’s Testimony

The Petitioner, Gary Bush, has been an inmate at the Tennessee Department of Corrections since September of 2007. Mr. Bush had no criminal record prior to the conviction under attack herein. Mr. Bush testified that he retained John and Jack Mitchell during the General Sessions proceedings in this case, based upon the recommendation of attorney John Norton. Mr. Bush further testified that he met with his trial attorneys approximately 20 times

¹ The allegations as set forth herein constitute those allegations which were both raised in the post-conviction Petitions and subsequently argued at the hearings in this cause. The initial and first amended Petitions were both filed *pro se*, prior to the appointment of counsel; these first two Petitions contained voluminous allegations, many of which were not addressed at the hearings in this cause. The Court considers all allegations that were not argued at the hearings to have been waived by the Petitioner. See Birdwell v. State, 2013 WL 6405733 at *4 (Tenn. Crim. App. 2013). Similarly, the Petitioner raised one additional issue at the hearing, but failed to include it in any of his three Petitions: that his trial counsel failed to play a recording of a telephone conversation for him prior to the trial that was played for the jury during the State’s case-in-chief. Under Birdwell, this issue was not properly before the Court, and is therefore waived; however, since the existence of the recording was related to the Petitioner’s decision not to testify at trial, the Court will address it in that context.

before trial; however, he maintains that his attorneys never discussed certain State's witnesses with him, although he also claims to have no recollection about what was discussed during his meetings with trial counsel. Mr. Bush voiced no complaints to the Mitchells about their representation, although he now states that he wanted them to obtain his co-defendant's employment records, which they did not do. Mr. Bush thought his attorneys were prepared for trial.

The Petitioner maintains his innocence, and testified that he does not believe that Kevin Patterson (who confessed to being the shooter in this case, and pled guilty to Murder in the Second Degree) was the killer. The Petitioner believes that Mr. Patterson was "on dope" at the time of his confession. The Petitioner further asserts that his trial attorneys should have called additional witnesses, and investigated other avenues of defense; the original Petition contained voluminous allegations in this regard, but Mr. Bush offered virtually no testimony to support his allegations. Nonetheless, these matters were touched upon during trial counsel's testimony, and will be discussed *infra*.

With regard to the dates of his co-defendant's employment at Gem-Top (where he was also employed), the Petitioner testified that he wanted his trial counsel to obtain her employment records. Although the Petitioner did not expound upon the importance of these employment records during his post-conviction hearing testimony, it appears from a review of his original Petition that he believes the employment records would have proven that he was not having an affair with the co-defendant at the time her husband was murdered, as she had "been gone from Gem Top for about three or four years before the victim's death..." See Petition for Relief from Conviction or Sentence, p. 13. Petitioner acknowledged, however, that his attorneys did a "very

effective job” of cross-examining the Gem-Top witnesses who testified during the State’s case-in-chief.

With regard to testifying at trial, the Petitioner testified that his trial attorneys simply told him that, as a general rule, “you don’t put a defendant on the stand,” and that he does not recall his attorneys advising him of the potential positive or negative implications of testifying in his own defense. The Petitioner recalls the Trial Court conducting a *Momon* hearing during the trial, but stated that he does not remember the hearing at all, insisting that he just followed his attorneys’ advice in his responses to the Trial Judge’s questions. Ultimately, the Petitioner testified that he decided not to testify based upon his attorneys’ general advice that “you don’t put a defendant on the stand.” Petitioner denies his trial counsel’s assertion, *infra*, that he is hot-tempered, and maintains that he would not have gotten angry or been nervous on the witness stand.

With regard to the audio recording of the telephone conversation between himself (as alleged by the State) and Jason Riley (Exhibit 3), the Petitioner testified that he never heard this recording before the trial began. The Petitioner stated that his attorneys told them that they had the tape, and that it would be played at trial, but that they never played it for him, and that he never asked them to play it for him. In fact, the Petitioner testified that he never even asked his trial attorneys what the theory of his defense was, as he thought they were “handling everything.” The Petitioner further denies that his co-defendant’s attorney, John Norton, played the tape for him prior to trial. The Petitioner testified that the recording had no effect on his decision not to testify; however, he denies that either voice on the recording was his. The Petitioner’s co-defendant at trial, Candance Bush, testified that the Petitioner accompanied her

into² Mr. Norton's office only once prior to the trial, that nobody from Mr. Norton's office met with Mr. Bush individually or privately that day, and that no tape recording was played in the presence of Mr. Bush that day.³ Mrs. Bush initially denied that she ever had a conversation with the Petitioner about the recording, but later, on cross-examination, she admitted that she asked the Petitioner about the recording, and stated that he denied that it was his voice thereon.

With regard to the *Tennessee Code Annotated* section being incorrectly cited in the Indictment, the Petitioner alleged that the Indictment charged him with violating T.C.A. § 39-2-202, a statute that was not in existence in 1982 (the year of the offense). Petitioner believes that his trial attorneys should have sought dismissal of the Indictment due to this defect.

Trial Counsel's Testimony

John Mitchell testified that he has practiced law since 1967. Jack Mitchell testified that he has been practicing law for 24 years, has had thousands of criminal clients, and has conducted approximately 10-20 jury trials in murder cases. Jack Mitchell further testified that he met with the Petitioner dozens of times before trial, discussed all potential witnesses and evidence with the Petitioner, and had a good relationship with the Petitioner. Additionally, Jack Mitchell testified that he received voluminous discovery from the State, filed pre-trial motions, and was prepared for trial.

Jack Mitchell testified that the lynchpin of the State's case was Kevin Patterson's confession (implicating the Petitioner and his co-defendant), which was corroborated by the

² Mrs. Bush acknowledges that Mr. Bush drove her to Mr. Norton's office on other occasions, but states that he did not accompany her into the office for those meetings.

³ Mrs. Bush acknowledges that Mr. Norton's investigator, Larry Shavers, played the tape for her that day, but denies that Mr. Bush was present. Initially, Mrs. Bush testified that she only listened to "2 or 3 seconds" of the recording before telling Mr. Shavers to cut it off because it upset her; on cross-examination, however, Mrs. Bush stated that she heard 3 or 4 seconds of the tape, but that it could actually have been a minute or a minute and a half. Mrs. Bush denies that Mr. Norton personally played the tape for her or Mr. Bush.

audio recording of the telephone call between the Petitioner and Jason Riley (Exhibit 3). John Mitchell testified that all decisions made in preparation for trial were tactical, based upon what was most beneficial to the Petitioner. John Mitchell further testified that he interviewed Randy Galloway, a potential witness named in Mr. Bush's original Petition who believed that an individual named John Martin had committed the murder; however, Mr. Mitchell concluded that Mr. Galloway had nothing to add to the defense. Similarly, Jack Mitchell testified that either he or John Mitchell interviewed Randy Gross, a potential witness named by Mr. Bush in his original Petition, but that nothing of use to the defense resulted from that interview. Likewise, Jack Mitchell testified that he tried to reach Lonnie Butcher, another potential witness named by Mr. Bush in his original Petition, and although Mr. Mitchell cannot specifically recall whether he spoke with Mr. Butcher, he is certain that he would have made every effort to do so if it were important to the defense. Additionally, Mr. Mitchell testified that while it was touched upon that Mr. Patterson's shoe size did not match a footprint found at the crime scene, Mr. Patterson's later confession essentially overrode that issue.

With regard to Kevin Patterson's confession, Jack Mitchell testified that Mr. Patterson was represented by attorney Ray White at the time of his plea. Mr. Mitchell opined that Mr. White is a good attorney. Mr. Mitchell further testified that he viewed the video recording of Mr. Patterson's confession, and that Mr. Patterson did not appear to be under the influence of anything. Mr. Mitchell stated that he learned at the preliminary hearing that Mr. Patterson never received the \$5,000.00 that was promised to him by the Petitioner and his co-defendant for killing the victim, so he decided to come forward and confess. Additionally, Mr. Mitchell noted that he cross-examined Mr. Patterson vigorously at the trial of this case.

With regard to the co-defendant's employment at Gem-Top, John Mitchell testified that the existence of a romantic affair between Mr. Bush and his co-defendant was relevant to the issue of motive. Mr. Mitchell testified that there was no direct evidence of an affair, but there was innuendo and witnesses who saw Mr. Bush and his co-defendant spending a lot of time together.

With regard to not calling the Petitioner to testify at trial, Jack Mitchell denies telling the Petitioner anything to the effect of "you don't put a defendant on the stand." In fact, Mr. Mitchell testified that he has previously put criminal clients on the stand. Mr. Mitchell testified that he spoke with the Petitioner at length before the trial regarding whether he should testify in his own defense. Mr. Mitchell testified that he explained to the Petitioner the value of the jury hearing his testimony, but also the dangers of taking the stand. One of Mr. Mitchell's specific concerns was that the jury would hear the Petitioner's voice if he testified, because a critical issue at trial was the identification of the Petitioner's voice on the recorded telephone call (Exhibit 3) that was played for the jury during the State's case-in-chief; according to Mr. Mitchell, if the jury concluded that the Petitioner's voice was the voice on the recording, then "his goose would have been cooked." Additionally, Mr. Mitchell was concerned that the Petitioner could "lose his cool" under cross-examination, because he was "indignant" and "easily riled," having displayed a quick temper to Mr. Mitchell on prior occasions. Further, Mr. Mitchell explained that, had the Petitioner testified, he would have had to contradict several witnesses whose testimony indicated that he was having an affair with the victim's wife (his co-defendant). Mr. Mitchell opined that it would have hurt the Petitioner's defense for him to testify. Mr. Mitchell testified that, after he and the Petitioner discussed the pros and cons of taking the stand, the Petitioner decided not to testify.

John Mitchell, Jr., testified that advised the Petitioner not to testify, because he thought it would be harmful to his defense. Mr. Mitchell further testified that he has never told a client that he would not be permitted to testify.

The trial transcript reflects that a *Momon* hearing was conducted by the Trial Court. *See* Exhibit 1, pp. 1195-96. During that hearing, the Petitioner acknowledged that he understood that he had the right to testify, and that that such had been explained to him by his trial counsel on multiple occasions; the Petitioner then informed the Trial Judge that it was his desire not to testify. *See Id.* at 1196.

With regard to the audio recording of the telephone conversation (Exhibit 3), attorney John Norton, who represented the Petitioner's co-defendant at trial, testified that he was "shocked" to hear Mr. Bush testify that he never heard the recording prior to the trial, because he personally played it for Mr. Bush himself after receiving verbal permission to do so from Jack Mitchell, who was on vacation in New Orleans at the time.⁴ Jack Mitchell confirmed that, while in New Orleans in April or May of 2008, he received a telephone call from Mr. Norton regarding the recording. Mr. Mitchell further testified that he and his father listened to the recording over 100 times in preparing for the trial, and that they discussed the recording with the Petitioner. Although Mr. Mitchell has no specific recollection of where or when he played the recording for the Petitioner, he insisted that if he did not play the recording for the Petitioner, it was because the recording had already been played for him by Mr. Norton, and the Petitioner did not want to hear it again. Mr. Mitchell further testified that he is "quite certain" that the Petitioner was provided with a copy of a transcript of the recording at his office. Furthermore, Mr. Mitchell

⁴ Incidentally, Mr. Norton specifically recalls that Mr. Mitchell told him that he was eating a Muffaletta at the time of the phone call. While obviously not relevant to the proceedings at hand, this testimony does serve to illustrate Mr. Norton's ability to recall minute details of the events surrounding the defense's discovery of the recording.

believes that the Petitioner admitted that it was his voice on the recording, and although the Petitioner had some explanation as to why he made the telephone call in question, it was too dangerous for the Petitioner to take the stand to testify about this matter, considering his temper.

With regard to the *Tennessee Code Annotated* section being incorrectly cited in the Indictment, both of the Petitioner's trial attorneys testified that the Administrative Office of the Courts provided the Trial Judge with a consultant who was present during the trial; according to Jack Mitchell, the consultant assisted the Trial Judge with the jury instructions, and in determining that the statute was properly charged. John Mitchell testified that he always kept his old statute books, and that he is certain that he would have tried to find something wrong with the Indictment, although he does not recall filing a motion to dismiss on that ground.

III. ANALYSIS

This Court finds that the Petitioner has failed to meet his burden of showing, by clear and convincing evidence, that his trial counsel's performance was deficient. This Court finds that both trial attorneys met and exceeded all standards of competency for criminal defense attorneys in Tennessee and any other state. Additionally, the Court finds that trial counsel fully apprised themselves of the facts and law applicable to the Petitioner's case, and explored all potential strategies and defenses.

With regard to Petitioner's assertion that trial counsel should have called additional witnesses or presented alternative defenses, the Court finds that counsel thoroughly investigated all potential witnesses and defenses; if counsel decided not to call certain witnesses or present certain defenses, such were calculated strategic decisions made in an effort to procure the Petitioner's acquittal. Moreover, the Petitioner testified that he never even asked his trial attorneys what the theory of his defense was, as he thought they were "handling everything."

Counsel will not be deemed ineffective merely because a different strategy or procedure might have produced a more favorable result. *See Rhoden, supra*, at 60.

With regard to Kevin Patterson's confession, the Petitioner's vague, unsupported assertion that Mr. Patterson was "on dope" is simply insufficient to meet the "clear and convincing" burden of challenging trial counsel's actions. It is undisputed that trial counsel viewed the video of Mr. Patterson's confession, and saw no evidence of drug impairment. It is further undisputed that trial counsel vigorously cross-examined Mr. Patterson at trial. This issue is without merit.

Likewise, with regard to the Gem-Top records, the Petitioner has failed to carry his burden of showing, by clear and convincing evidence, how trial counsel's failure to obtain certain employment records fell below the applicable standard of competency. Petitioner acknowledged that his attorneys did a "very effective job" of cross-examining the Gem-Top witnesses who testified during the State's case-in-chief.

With regard to the Petitioner's decision not to testify at trial, the Court finds that this decision was made solely by the Petitioner after consultation with and advice from trial counsel; the Court specifically discredits the Petitioner's assertion that trial counsel categorically refused to put him on the witness stand. The Petitioner participated in a *Momon* hearing during the trial (as required by law), further demonstrating his understanding of his right to testify, and documenting his decision not to do so. The Court further finds that Petitioner's testimony regarding his not having heard the audio recording of the telephone conversation (Exhibit 3) prior to trial was not credible. Furthermore, the Court finds that Candance Bush's testimony regarding this issue was not credible. The Court believes that the discovery of this recording was a critical and defining moment for the defense, and it strains credulity to believe that the

recording was not played for Mr. Bush (whether by Mr. Norton, Mr. Jack Mitchell, or both) before the trial began. The Court found both Mr. Norton and Mitchell to be credible on this point. This Court believes that the recording was played for, and discussed with, Mr. Bush prior to the trial, and that the existence of the recording weighed heavily in Mr. Bush's strategic decision not to testify.

With regard to the Indictment listing an incorrect *Tennessee Code Annotated* section, it is well-settled that an Indictment need not contain a reference to a statute, and that any such reference is merely surplusage. See State v. McCracken, 489 S.W.2d 48, 51 (Tenn. Crim. App. 1972), *cert. denied* 12/4/72. The facts constituting the offense of First Degree Murder were adequately set forth in the Petitioner's Indictment, and that is all that is required under the law. Id. Moreover, the substantive language of the two statutes in question (Exhibit 1) is virtually identical. This Court finds no deficiency in trial counsel's failure to challenge the Indictment on this ground.

As the Petitioner has failed to meet his burden under the first prong of the Strickland test, it is unnecessary to examine the second prong, and the Petitioner's claim must fail. See Goad, *supra*, at 370.

IV. CONCLUSION

Accordingly, the petition for post-conviction relief is not well-taken, and the same is hereby DENIED.

IT IS SO ORDERED.



M. KEITH SISKIN
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Order has been mailed, postage prepaid, to the following:

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Assistant District Attorney General
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Stephen W. Pate, Esq.
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This the _____ day of _____, 20_____.

Deputy Clerk